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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ELIN ABAD,

Plaintiff and Appellant,

v.

THE WALT DISNEY COMPANY, et al.,

Defendants and Respondents.

B284832

(Los Angeles County
Super. Ct. No. BC603514)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Ernest M. Hiroshige, Judge. Affirmed.

Shegerian & Associates and Carney R. Shegerian for
Plaintiff and Appellant.

Davis Wright Tremaine, Emilio G. Gonzalez and Elizabeth
J. Carroll for Defendants and Respondents.

INTRODUCTION

Plaintiff Elin Abad sued her former employer, The Walt Disney Company; American Broadcasting Company, Inc. (ABC); ABC Television; Disney ABC Television Group; and Keystone Paying Agent, Inc. (collectively, Disney), alleging discrimination, harassment, and retaliation based on pregnancy under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).¹ Abad contends that she was constructively discharged following a campaign of harassment and discrimination from her supervisor and a human resources representative. Disney contends that there was no harassment or discrimination, and Abad resigned because she did not receive a promotion she was not qualified for. The trial court granted summary judgment in Disney's favor.

We affirm. Disney demonstrated on summary judgment that Abad could not prove the elements of a prima facie case for discrimination, harassment, or retaliation under the FEHA, and the evidence Abad presented in opposition did not demonstrate a triable issue of material fact. The evidence does not support a finding that Abad was constructively discharged, that Abad was qualified for the position she sought, that Disney acted with a discriminatory motive, or that any adverse employment actions were connected to protected activity. Thus, the trial court did not err in granting summary judgment, and we affirm that judgment.

Disney also requests attorney fees on the basis that Abad's arguments on appeal are unreasonable. We find that Abad's arguments are not so unreasonable that they warrant an award of attorney fees, and therefore deny Disney's request.

¹All further statutory references are to the Government Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

A. Complaint

Abad filed a complaint against Disney alleging fifteen causes of action: (1) discrimination on the basis of pregnancy in violation of FEHA; (2) harassment on the basis of pregnancy in violation of FEHA; (3) retaliation for complaining of discrimination and/or harassment on the basis of pregnancy in violation of FEHA; (4) discrimination on the basis of taking California Family Rights Act (CFRA, § 12945.2) leave in violation of FEHA; (5) retaliation on the basis of taking CFRA leave in violation of FEHA; (6) discrimination in violation of the Pregnancy Disability Act; (7) retaliation for complaining of discrimination and/or harassment in violation of the Pregnancy Disability Act; (8) discrimination on the basis of gender in violation of FEHA; (9) retaliation for complaining of discrimination and/or harassment on the basis of gender in violation of FEHA; (10) failure to prevent discrimination, harassment and retaliation; (11) wrongful termination in violation of public policy; (12) wrongful termination in violation of public policy (discussing wages); (13) failure to promote in violation of FEHA; (14) breach of implied-in-fact contract not to terminate employment without good cause; and (15) intentional infliction of emotional distress.

Disney moved for summary judgment, and the court granted the motion. The following facts were set forth in the motion for summary judgment, opposition, and supporting evidence. The general facts are largely undisputed; we note where the evidence conflicts.

B. Abad's employment background

Disney hired Abad as a manager in the Creative Content group in May 2012. According to Marissa Messier, Vice President of Creative Content, "Creative Content is part of the Walt Disney Studios Marketing Department and is responsible for creating content that will attract and retain an audience in anticipation of the release of a film. Such content includes filmed vignettes featuring themes or characters from the movie, interviews with actors or filmmakers and behind the scenes short films, but does not include trailers, which are produced by a separate group within Theatrical Marketing."

When Abad was hired, Creative Content consisted of vice presidents Messier and Cardon Walker, executive director Brian Mansur, senior manager Jeff Redmond, and administrative assistant Kristen Darling. Walker resigned in June 2013, and Messier became the sole team leader. Redmond was promoted to a director position in January 2014. Abad stated in her declaration, "I reported to Ms. Messier on paper, but in reality I supported Mr. Mansur and Mr. Redmond as well."

As a manager, Abad's role in Creative Content was to "help[] to make sure that the team was on track and that projects and materials flowed through to completion on schedule in a timely manner." Abad stated in her declaration that she updated Microsoft Excel charts "that would keep the team organized and on top of the creative pieces that we were working on" and "[sat] in on team meetings where we talked through creative ideas."

The parties agree that Abad did her job well. Messier stated in her declaration that "Ms. Abad was an excellent Manager." Performance reviews for fiscal years 2012, 2013, and

2014 state that Messier was very happy with Abad's work. In early 2014, Abad was selected for the Disney Way One program, a class for "employees to watch" at Disney. In the summer of 2014, Abad participated in a temporary assignment with the Synergy group, a marketing group that partners with Creative Content to place the pieces developed by Creative Content. Abad stated in her declaration that she participated in this temporary assignment "[b]ecause I did not see any promotional opportunity on my own team at the time."

Over time, Abad's duties within Creative Content expanded. Abad stated that she "became much more involved in the creative side of the team and was exposed to the creative work" that Redmond and Mansur were doing. The parties agree that Mansur struggled with the demands of the job. Messier said Mansur's "projects were not as well-received by our partners as Mr. Redmond's." Abad said that because Mansur's work was falling short, "behind the scenes, I was doing much of the work that [Mansur] should have been doing on his own." Abad stated that as a result, she was performing "duties that were required of a Director."²

C. Abad's interest in a promotion

Abad stated that she had ongoing discussions with Messier about "the possibility of promoting me to Senior Manager because I had been taking on so much more responsibility above my pay grade." Abad stated, "Our discussions were not about bumping me up to Senior Manager because my job duties were going to

²Abad was working in the Synergy group from June to October 2014. It is unclear from the record whether she was still taking on these duties within the Creative Content group at that time.

change, but how it would be justified because I was already taking on that level of work.”

In November 2014, Abad and Messier met to discuss the possibility of a promotion. Abad said they “went through my job responsibilities, and . . . it became clear that a lot of my job responsibilities overlapped with the list she had given me under [*sic*] what a Director should be handling.” According to Messier, Abad said “that she was doing Mr. Mansur’s work and that she was therefore ready to be promoted into a director role.” Messier stated that she did not agree with Abad’s description of her work, and “I also did not think that the fact that Ms. Abad was doing Mr. Mansur’s work, even if true, qualified her to be a Director.” Messier said that because Mansur’s work was substandard, even with purported assistance from Abad, “my reaction was that that work was not good enough to merit a promotion from Manager to Director.” At summary judgment, it was “[u]ndisputed that Messier told Abad that she did not think she was ready to be promoted to director in late 2014.”³

Messier stated in her declaration that she suggested promoting Abad to a senior manager position, and asked Abad to “create a document that would help me justify the promotion to Human Resources and my supervisors.” Abad responded by giving Messier a document that “had my responsibilities in black and showed in red the responsibilities of a Director that I had taken straight from her Director job description, essentially

³ In her reply brief, Abad states, “Abad does not admit to being told she was not qualified for the Director role in November 2014, only that they discussed a promotion to director.” This statement does not comport with the record, where Abad admitted in her separate statement that Messier told Abad in late 2014 that she was not ready to be a director.

showing her that I was already performing most of the work expected of a Director.” Messier stated, “Instead of providing me with documents I could use to help justify her promotion to Senior Manager, what Ms. Abad provided me was a revised job description, which I did not think would be of much use in justifying a promotion.” Abad stated that a few months later, Messier “presented me with a document titled ‘Manager—El Abad, Next Steps.’ . . . I was . . . surprised because we had discussed the different things I was handling, and Ms. Messier told me that she would lobby for me, but now she was essentially telling me, You have to show me this much more.”

D. Abad announces she is pregnant; allegations about negative comments from Messier

Abad announced in December 2014 that she was pregnant and would be taking parental leave in the spring. Meanwhile, Redmond was planning to take parental leave “around that same time,” and Messier was planning her upcoming wedding scheduled for September 2015. Abad testified in her deposition that after she announced she was pregnant, Messier “literally congratulated me in one breath,” and then said, “Man, you’re in for it,’ . . . like, why would you do this to yourself kind of thing.” Abad gave a conflicting account of the conversation in her declaration, stating that when she told Messier she was pregnant, Messier’s “remark was a snarky Good luck with that.” According to Abad’s declaration, “Ms. Messier began to distance herself from me, and I could tell that she was not happy about the news of my pregnancy.”

Abad contended that throughout her employment, Messier made a number of comments that were negative about parenthood and disparaging toward working parents. Abad

testified at her deposition that Messier “was very vocal about never wanting kids.” For example, Messier made comments such as, “[Children] are such terrors, especially when they become teenagers,” “I’m just fine being an auntie forever,” and regarding parenthood, “Why would anybody do that to themselves?” Abad testified that one time when she and Mansur were discussing children, Messier said, “I just would never do that to myself. I’m, like, too selfish to do that. This is it for me,’ as in my career.” Abad said Messier also commented that most high-level executive women in the company either did not have kids or rarely saw their kids. Abad testified that Messier made comments such as these “numerous times,” but “she seemed to say it way more frequently after she knew I was pregnant.” However, Abad testified that she could recall only three specific comments that Messier made after Abad became pregnant.

Abad testified that she found these comments “very offensive.” She also testified that after she announced her pregnancy, Messier became “very just passive aggressive and short with me,” so that “it almost seemed like she was irritated that I was even there talking to her.” Abad testified that she was not excluded from any work-related activities or meetings. Abad never complained of Messier’s comments to human resources, but she did complain to colleagues she considered friends.

Abad also said Messier “flipped her off” in January 2015. Abad testified that she went into Messier’s office “to tell her something work related,” and Redmond was in there; Messier seemed irritated. Abad told Messier what she intended to say, and “turned around to walk out, and then I realized I had just one other thing to tell her, and then when I turned back to finish my thought, she was flipping me off” with two hands.

Abad's parental leave began on April 10, 2015. Abad stated that at the time of her leave, "I fully intended to return to work at Disney at the completion of my maternity leave."

E. A director position becomes available on the Creative Content team

Sometime in April 2015, Mansur informed Messier that he intended to resign. Disney allowed Mansur to select his date of separation, and he chose to leave on June 5, 2015. Abad "found the fact that the timing of Mr. Mansur's exit from the company came while I was out on maternity leave suspicious." Mansur stated in his declaration, "My departure from Disney had absolutely nothing to do with the fact that Ms. Abad was on maternity leave. Ms. Abad was never discussed in connection with my departure."

The open Creative Content director position was posted online. Abad stated in her declaration, "I found it odd that Ms. Messier knew that I had been handling a large portion of [Mansur's] job duties and knew I was very interested in his position, yet made no effort to reach out to me to tell me that the job was being posted." On June 1, 2015, Abad emailed Messier and said she had heard about Mansur's resignation, and stated, "[T]his is not only the perfect opportunity for me individually but would also serve the best interests of the team. As you and the team know, I've been taking on many of [Mansur's] Director responsibilities already. . . . I've applied for the position online. Please let me know when is a good time for us to get on a call this week to discuss."

Abad said that after she sent this email, she and Messier spoke by phone on June 2, and Messier "told me that I was a great candidate for the role, that I was well liked by the

executives in the company, and that I would absolutely get an opportunity to interview for the role.” Messier stated in her declaration that she still did not feel that Abad was ready to fill the director role, but she was willing to entertain Abad’s application in case a more qualified candidate did not apply. Messier stated, “I told Ms. Abad that I would inform Recruiting that she qualified to skip the screening rounds and go into the final round, which was the round in which a select group of applicants would be brought in to interview with the team and asked to pitch a creative content idea.” For the pitch, “the candidate would be asked to prepare a slate of creative content ideas for a particular film, explain how those ideas would be realized, describe the impact they would have on the marketing of the film and, if necessary, defend those ideas.”

On June 15, Abad emailed Messier and asked about the status of the hiring process. Messier said they met with “a first round of candidates last week and some this week,” and would probably “have follow up interviews with top candidates in July.”

On June 22, human resources representative Ayako Hirano emailed Abad and told her that a director position on another team was available, and that “I did give your name to Frank as a possible candidate.”⁴ Hirano asked, “Are you still looking only at the Director level even outside of Creative? Let me know.”

On July 1, Abad responded to Hirano’s email and said she had spoken with Messier about the director job opening on Creative Content. She stated in the email that “the timing and the sense of what occurs [*sic*] makes me feel at an intentional disadvantage. Given my pregnancy and leaves that have

⁴The record is not clear as to what position or team this references.

occurred as a result. Also, as I expressed to [Messier], the way the team handled the news of [Mansur's] departure and then subsequent posting of the position on job boards for all to apply without even letting me know that it was available left me feeling very out of the loop. A major change that effected [sic] my career was made while I was away and no one communicated it to me, and to be honest I feel that this was not just by happenstance. This makes me very distraught and anxious as my career means everything to me and my young family." Abad thanked Hirano for "letting me know about other available positions," but said she was most interested in the director position for Creative Content. Abad said in her deposition that by the time she sent this email on July 1, 2015, she had contacted an attorney because "I felt that something was going on, so I was getting advice." Abad stated in her declaration that Hirano never responded to this email.

In the meantime, on June 24, the recruiter who was working with Messier to fill the Creative Content director position emailed Messier about candidates, and noted that Abad had applied. Messier gave her opinion on several candidates, and stated, "Abad works on my team. . . we may keep her in the mix for a second round of interviews (I have spoken to [Hirano] about her as well. She ultimately isn't a good fit, but we may have her come in as a courtesy.)"

On July 6, Abad informed Messier that she would be taking an additional 12-week baby-bonding leave as soon as her parental leave expired, and therefore she expected to return in early October 2015. On July 31, Abad emailed Messier to update her expected date of return to October 26, stating that her physician had delayed the date Abad was cleared to return to work, thus

pushing back the start of the baby bonding time. Messier responded by email, and told Abad that the second round of interviews for the director position would likely be held in the next two weeks, and she would keep Abad posted.

On August 6, Messier emailed the recruiter and Hirano with a list of “the candidates that would be great to bring back for round two of interviews.” Abad was on the list, with a parenthetical note to Hirano stating, “have you touched base with her yet? We should chat about how exactly to handle her interview.”

Sometime between June and August 2015, Messier discussed the director position with a colleague, Evelyn Livermore. Livermore testified that she asked Messier if she was considering Abad for the position. Messier “shared that she had been considering her, but she wasn’t ready for the role,” which Messier said was “sad because I don’t think [Abad] would come back if she doesn’t get the role.”

On August 21, 2015, Abad wrote in an email to Messier, “What’s the latest with the Director role? Have you given any more thought about doing something similar to the opportunity Jackson gave to Katie, allowing me to develop in the role under you?” Messier responded, “[Hirano] is going to set up a call for the 3 of us to chat through next steps on your development. I think she’s going to try to set that for this week if you are available. I can update you on where we are at with the Director role search then!”

Ultimately, Abad did not interview for the director job with Creative Content. Abad contended this was “because she was neither invited to do so nor specifically told when the interviews would occur.” Messier and Hirano spoke with Abad by phone on

September 8, 2015, and let Abad know that the director position would be filled by a different candidate. They told Abad that she was not ready for the director position, but she could apply for other positions in the marketing department. Abad testified that she felt like Messier “slighted me because she had told me that she was going to bring me in for interviews, and then she waited till she was on a call, not just with me but with [Hirano], with H.R. on the call too, for the first time telling me that I wasn’t ready and that I wasn’t being considered.”

The Creative Content director position was filled by Natalie Artin, a woman who, according to Messier, “had extensive experience planning creative content to tie into film and television marketing and also interfaced regularly with actors and directors.”

F. Abad’s interest in other director positions

Both before and after the director position became available on the Creative Content team, Abad sought promotion opportunities on other teams. Hirano stated that in May 2014, she became aware that Abad had inquired about a director-level position on the Animation/Pixar Brand team. The vice president of that team, Paul Baribault, told Hirano in an email that he was impressed with Abad. However, he let Abad know that “we are looking at people who have more cross company experience currently, who are operating at a higher level than she is now.” ~ He stated that the Synergy rotation would be a great opportunity for Abad.

By late 2014, Abad was having “regular conversations with Ms. Messier and Ms. Hirano about my growth outside the Creative Content team because there were no open positions on my team.” Hirano stated that Abad was “looking for

opportunities in other groups that would match her skills and interests. She made it clear to me . . . that she was not interested in a lateral move into a manager position and that she wanted to be promoted into a Director position.”

In April 2015, just prior to Abad’s parental leave, Abad learned of an open director-level position on the Animation/Pixar Brand Team under vice president Jackson George. At her deposition, Abad said she wanted to work with George because “I thought he was a creative genius,” but she did not want to move laterally onto his team as a manger, because “I wanted a promotion.” According to Abad, she and George “had great conversations” about the position. Abad testified that Messier later told her she spoke with George, and in that conversation Messier praised Abad’s work but also said, “I did mention to him that . . . I didn’t know if you and him would have creative chemistry together.” Abad testified, “[R]ight there I knew she killed my chances” for that position.

Abad’s statements conflict with George’s recollection. He did not recall Messier expressing any reservations about Abad taking a position on George’s team. George testified that Abad mentioned informally that she was interested in the position on his team, so they agreed to meet and discuss it. When Abad and George met, they discussed the title for the position, and Abad expressed that she was “interested in the director position.” George testified, “I mentioned to her in that meeting that I was not yet sure if it was going to be a director position or a manager position. And I asked her if she would still be interested in that as a manager position, and she said, No.” George stated, “[W]hen [Abad] mentioned the director/manager thing, that was a big kind of tick in my head that it didn’t seem like that was maybe

the right fit.” He continued, “I’m much less interested in someone who wants a job for a title,” thus, “my alarm bells went off a little bit when she said she was not interested . . . in the job at a manager position.”

The job on George’s team ultimately was filled as a manager position by a candidate who had worked closely with George. When Abad was asked at her deposition, “Would you have wanted the job once it became downgraded to manager?” Abad responded, “No. Senior manager I would apply. Manager, no.”

At some point Abad spoke with Kristina Witczak about a position on Witczak’s team. The record is not clear as to when this conversation occurred, but according to Abad, it was around the same time she was seeking a position on George’s team in April 2015. Abad stated in her declaration that during the call with Messier and Hirano near the end of Abad’s parental leave in September 2015, Messier told Abad that she had spoken with Witczak about Abad’s interest in joining Witczak’s team. According to Abad, Messier said she told Witczak that she did not believe Witczak and Abad would have creative chemistry. At her deposition, Abad was asked whether she had ever applied for the manager position on Witczak’s team, and Abad answered, “No.” The position title was later changed to senior manager, but Abad did not know of the change and did not apply for the position.

Witczak stated in a declaration that she spoke with Abad about the position, and Abad said that she would be interested only if it were director level, not manager level. Witczak stated, “[I]t suggested to me that Ms. Abad’s primary interest was in gaining a promotion and that she was less driven by an interest in doing the work my team would be doing. . . . Based on my

interaction with Ms. Abad, I did not consider her a good fit for the role I was looking to fill on my team.” Witczak did not recall Messier saying anything to her about “creative chemistry” with Abad.

In September 2015, a new director position arose on a digital marketing team in the Creative Content group under Andre Fonesca and Messier. Fonesca said he was seeking a director to create and produce short-form content “specifically designed for use on digital social media.” Fonesca stated in his declaration, “To my knowledge, no person on the Creative Content team had expertise in producing this type of digital content.” Abad testified that she spoke with Messier about the position, and Messier encouraged Abad to speak to Fonesca about it. When Abad contacted Fonesca, he encouraged her to apply for the position.

Abad did apply for the position. However, a different candidate with “several years of experience in digital marketing for films and television programs” was ultimately selected for the role. Abad stated in her declaration that she “learned that Ms. Messier spoke to Mr. Fonesca and told him that she didn’t think I was qualified.” However, Fonesca stated in his declaration, “Ms. Messier and I never spoke about Ms. Abad or her interest in the Director of Short Form Content position.”

G. Abad’s resignation

Abad’s parental leave was scheduled to end on October 26, 2015. Abad resigned on October 21, 2015. She testified that she began to think about not going back to Disney after the September 8 call with Messier and Hirano. Abad said she weighed the pros and cons of leaving, and “just felt like I couldn’t go back” because “I should have felt that I was going back to a

happy place, a positive place,” but instead “I had a lot of anxiety about going back.”

Abad stated in her declaration that she had no choice but to resign because “Not only had Ms. Messier taken action to prevent me from receiving the Senior Manager and Director roles on her team, but she and Ms. Hirano had reached out to hiring managers regarding other roles behind my back, misrepresented my work, told them that I would not be a good fit, told them that she didn’t think we would have ‘*creative chemistry*,’ and otherwise thwarted any chance I had of receiving a promotion.” Abad testified that she did not have any reason to believe that her manager position would not be available to her when she returned from her leave. She also testified that Messier never said she did not want Abad to return as a manager, and that Hirano made clear that they would continue to look for opportunities for Abad to advance at Disney.

H. Summary judgment

Disney moved for summary judgment and summary adjudication of each cause of action. It asserted that the evidence did not support a finding that Abad was constructively discharged, Abad could not establish a *prima facie* case of discrimination, there was no evidence of discriminatory animus, the alleged pregnancy harassment was not hostile or abusive, and there was no evidence of retaliatory intent.⁵

⁵Disney also asserted in its motion for summary judgment that Abad’s intentional infliction of emotional distress cause of action was untenable because it was preempted by workers’ compensation. Because Abad has not asserted on appeal that that cause of action should survive, we do not address that argument here.

Abad opposed the motion, asserting that she “was denied at least four promotions and constructively discharged because of her pregnancy, pregnancy leave, and gender.” She also asserted that Disney’s reasons for not promoting her were pretextual.

The court issued a tentative ruling before the hearing. Beginning with the second cause of action for harassment on the basis of pregnancy, the court stated that the conduct Abad described was not sufficiently severe or pervasive enough to constitute harassment. Although Abad may have found some of Messier’s comments about parenthood upsetting, the comments were relatively trivial and were not specifically directed at Abad. The court therefore granted the motion as to the second cause of action.

The court then considered whether there was a triable issue of fact as to whether Abad had been constructively discharged. The court noted that it was undisputed that Abad had resigned, and therefore she was required to prove constructive discharge: that the working conditions were so intolerable that a reasonable person would be compelled to resign. The court noted that not receiving a promotion was not sufficient to prove constructive discharge, and held that “allegations arising out of Defendants’ failure to promote Plaintiff are insufficient to establish a constructive discharge.” The court therefore granted the motion as to the following causes of action: (1) discrimination on the basis of pregnancy in violation of FEHA; (3) retaliation for complaining of discrimination and/or harassment on the basis of pregnancy in violation of FEHA; (4) discrimination on the basis of taking CFRA leave in violation of FEHA; (5) retaliation on the basis of taking CFRA leave in violation of FEHA; (6) discrimination in violation of the

Pregnancy Disability Act; (7) retaliation for complaining of discrimination and/or harassment in violation of the Pregnancy Disability Act; (8) discrimination on the basis of gender in violation of FEHA; (9) retaliation for complaining of discrimination and/or harassment on the basis of gender in violation of FEHA; and (11) wrongful termination in violation of public policy.

The court then turned to the causes of action for discrimination based on Disney's alleged failure to promote Abad. The court noted that to succeed on a claim of failure-to-promote, the plaintiff must prove that she was qualified for the position. The court said Abad "submits no evidence that she attempted to schedule an interview" for the Creative Content director position, "or was prevented from doing so." The court also said that Disney's evidence negates an inference of discriminatory animus, because the candidate selected for the position was a woman, and she was never asked whether she planned to have children. In addition, Disney had presented evidence that Abad was not qualified for the roles she sought. The court therefore granted the motion as to the 13th cause of action for failure to promote in violation of FEHA.

The court held that the 10th cause of action for failure to prevent discrimination, harassment and retaliation and 15th cause of action for intentional infliction of emotional distress relied on the other causes of action, and therefore summary judgment was appropriate to those causes of action as well. The court deemed the motion for summary adjudication moot.

At the hearing on the motion, the court heard argument from both sides. The court allowed the parties to file short supplemental written arguments, and took the matter under

submission. The court later granted the motion, rejecting Abad's additional arguments and adopting the tentative ruling as the final ruling.

The court entered judgment, and Abad timely appealed.

DISCUSSION

Abad asserts that the trial court erred by granting Disney's motion for summary judgment. Summary judgment is appropriate if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if . . . the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "We review the trial court's grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484.)

"Under the FEHA, it is unlawful for an employer to engage in adverse employment practices against a person on the basis of 'sex' (§ 12940, subds. (a)-(d), (j)), a term defined to include '[p]regnancy or medical conditions related to pregnancy.' (*Id.*, § 12926, subd. (r)(1)(A).)" (*Abad v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 735 (*Western Dental*).) Under section 12940, subdivision (a), an employer cannot, based on a person's pregnancy, "refuse to hire or employ the person," "bar or . . . discharge the person from employment," or "discriminate against

the person in compensation or in terms, conditions, or privileges of employment.”⁶

A. Discrimination

“In California, courts employ at trial the three-stage test that was established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, to resolve discrimination claims. . . . (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) At trial, the employee must first establish a prima facie case of discrimination, showing “‘actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were “based on a [prohibited] discriminatory criterion. . . .’”” (*Id.* at p. 355.) Once the employee satisfies this burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. (*Id.* at pp. 355-356.) A reason is “‘legitimate’” if it is ‘facially unrelated to prohibited bias, and which if true, would thus preclude a finding of discrimination.’” (*Id.* at p. 358.) If the employer meets this burden, the employee then must show that the employer’s reasons are pretexts for discrimination, or produce other evidence of intentional discrimination.” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2.)

⁶ On appeal, Abad does not make discrete arguments regarding specific causes of action. For example, in her appellate briefing, Abad does not cite the Family Rights Act (§ 12945, et seq.) or argue that the employment actions at issue violated public policy. Instead, Abad appears to assume that each cause of action is subsumed within the arguments discussed here, which focus mainly on the FEHA.

“In the context of summary judgment an employer may satisfy its initial burden of proving a cause of action has no merit by showing either that one or more elements of the prima facie case ‘is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors.’” (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1181.) “The specific elements of a prima facie case may vary depending on the particular facts.” (*Guz, supra*, 24 Cal.4th at p. 355.) “Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.” (*Ibid.*)

The parties do not dispute that Abad was a member of a protected class. We therefore discuss the remaining three elements (though not in the same order listed above), and find that the evidence Abad presented was insufficient to establish a prima facie case.

1. *Constructive discharge*

Abad asserts that she suffered an adverse employment action in that she was constructively discharged because of her pregnancy. She asserts that “from the time Abad announced her pregnancy in December of 2014 through her forced resignation in October of 2015, Abad experienced a campaign of conduct by Messier and Hirano that left Abad with no option but to self-terminate her employment.” In its motion for summary judgment, Disney asserted that Abad could not establish that she was constructively discharged, and the court granted the motion for summary judgment, in part, on that basis.

“Constructive discharge occurs when the employer’s conduct effectively forces an employee to resign.” (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244 (*Turner*).) “[A]n employee cannot simply ‘quit and sue,’ claiming he or she was constructively discharged. The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.” (*Id.* at p. 1246.) “[T]he standard by which a constructive discharge is determined is an objective one—the question is ‘whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.’” (*Id.* at p. 1248.) In addition, “the employee’s resignation must be *employer*-coerced, not caused by the voluntary action of the employee or by conditions or matters beyond the employer’s reasonable control.” (*Ibid.*)

The evidence presented by the parties does not allow for a finding of constructive discharge. Viewing the evidence in a light most favorable to Abad, the evidence shows that Abad wanted a promotion, but did not get one. Abad admitted in her deposition that she had no reason to believe that her manager position would not be available to her upon her return from parental leave, and none of the evidence suggested the working conditions for that position would be intolerable.

Abad argues that “Messier’s repeated comments to Abad, denigrating her desire to become a mother and have a family, then passing Abad over for a promotion under false pretenses . . .

led Abad to realize she had no choice but to resign.” The evidence does not support Abad’s conclusion. Abad admitted that she could recall only three comments Messier made regarding parenthood between December 2014, when Abad announced her pregnancy, and April 10, 2015, when Abad’s leave began. Abad never told Hirano or anyone else in human resources about these comments. When Abad’s parental leave began, Abad stated that she fully intended to return to Disney. While Abad was on leave, she sought two separate positions—the director role vacated by Mansur and the digital content director role under Fonesca—that reported to Messier. Thus, Abad’s own statements do not support her assertion that Messier’s comments about working parents created working conditions so intolerable that Abad had no reasonable alternative but to resign.

Abad asserts that “it is impossible to separate the comments made by Messier and Messier’s refusal to even interview Abad” for the director role. To the contrary, it is undisputed that Messier felt that Abad was not ready to take on the role of director in late 2014—before Abad announced her pregnancy. Abad claims she was doing Mansur’s work for him and therefore was capable of replacing him, but the parties agree that Mansur’s work was not of a quality Messier desired. Abad has not presented any evidence, other than her own assertion that she deserved a director position, that Messier’s failure to promote Abad was related to Abad’s pregnancy.

Moreover, Abad cites no controlling authority, and we have found none, holding that denial of a promotion, in the absence of other intolerable conditions, constitutes constructive discharge. Indeed, a “poor performance rating or a demotion, even when

accompanied by reduction in pay, does not by itself trigger a constructive discharge.” (*Turner, supra*, 7 Cal.4th at p. 1247.)

Abad cites *Clark v. Marsh* (D.C. Cir. 1981) 665 F.2d 1168 (*Clark*), a Title VII discrimination action initiated in 1977 by a woman who began her career in the Army in 1950. The plaintiff alleged discrimination in certain employment practices, and the district court concluded that the plaintiff “had been subjected to disparate treatment and disadvantaged by employment practices having disparate impact.” (*Id.* at p. 1171.) On appeal, the Circuit Court held that constructive discharge had been established: “Plaintiff does not claim only a single instance of nonpromotion, or even simply a period of nonpromotion. Instead she alleges, and the district court found, a continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training, existing over a period of several years.” (*Id.* at p. 1174.) The district court also found that the failure to promote the plaintiff “was not due to any deficiencies in plaintiff’s qualifications . . . but to ‘pervasive systemic defects’ in the program’s operation.” (*Ibid.*)

Here, by contrast, plaintiff complains that over a period of less than a year, she did not receive multiple promotions that she felt she deserved, although Messier, her direct supervisor, did not think she was ready for a director position. Abad does not suggest that the failure to promote her was due to systemic problems at Disney. Indeed, the evidence shows that Abad was encouraged to apply for multiple positions, and to work a temporary rotation on another team to increase her marketability. Abad rejected the possibility of moving laterally as a manager to other teams that would have placed her under a

different supervisor. The court's finding in *Clark* that a continuous pattern of discriminatory treatment over several years may constitute constructive discharge does not support Abad's position that constructive discharge was present in this case.

Abad also cites *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256 (*Kovatch*) (disapproved of by *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th 826). In that case, the plaintiff employee, Kovatch, alleged constructive discharge due to harassment based on his sexual orientation. At summary judgment, the evidence showed that in the three months Kovatch worked in the employer's San Diego office, his supervisor, Aldinger, called Kovatch's neighborhood the "fag capitol of San Diego"; called other people "faggots"; told Kovatch that another employee had been fired for being gay; told Kovatch, "I hate faggots"; warned Kovatch that the employer was not a company for gays; refused to respond when Kovatch said hello; refused to shake Kovatch's hand; asked Kovatch if he had a speech impediment; commented that Kovatch had a problem with women; told Kovatch to start looking for another job; and said, "Let me make something loud and clear to you, Dan. I don't like you. You're a faggot, and there is no place for faggots in this company. And when [a manager] and I meet with you tomorrow, you're fired." (*Id.* at pp. 1269-1270.) After the last statement, Kovatch did not return to the office and took a medical leave. The Court of Appeal held that the evidence was sufficient to present a triable issue of fact as to constructive discharge: "Viewed in its entirety, Kovatch's evidence is sufficient to give rise to triable questions of fact as to whether Aldinger's apparent hostility toward Kovatch was motivated by Kovatch's sexual

orientation and whether a reasonable person in Kovatch's position would have found Aldinger's behavior intolerable." (*Id.* at p. 1270.)

This case is not similar to *Kovatch*. Here, Messier made several comments about her own choice not to have children and her views on parenthood. Abad could only remember three comments in the time period between December 2014, when she announced she was pregnant, and April 2015, when her leave began.⁷ However, evidence of a few offhand comments, which were not directly disparaging to Abad, does not amount to the intolerable working conditions in *Kovatch*.

Abad also asserts that her constructive discharge allegation is supported by evidence that "Messier sabotaged Abad's attempts to be promoted to a director position despite Abad's qualifications." The evidence does not support a triable issue of fact as to any alleged sabotage.

In support of this contention, Abad cites the portions of her declaration in which she claims Messier interfered with her chances of being hired on George's, Witczak's, and Fonesca's teams. Abad claims that after Messier talked to George about Abad, Abad "knew that Messier had killed her chances." However, the position on George's team was filled as a manager role, which Abad testified that she did not want and would not have accepted. Moreover, George testified that Abad did not seem right for his team based on his own conversations with Abad, not any information from Messier.

⁷In her brief, Abad contends that "Messier also shunned and excluded Abad after learning of Abad's pregnancy." However, Abad testified that she was not excluded from any work-related activities or meetings.

The evidence also does not support a finding that Messier interfered with Abad's chance at a role on Witczak's team. At her deposition, Abad was asked whether she had applied for the manager position on Witczak's team, and Abad said no. In addition, Witczak testified that she was put off by Abad's interest in the position only if it resulted in a promotion. Abad testified that she was angry when she heard Messier had questioned whether Abad and Witczak would have "creative chemistry," but there is no direct evidence that such a comment was made to Witczak, and there is no evidence that such a comment affected Abad's chance of working with Witczak.

Similarly, the evidence does not show that Messier affected Abad's chances of working with Fonesca. Abad stated in her declaration that she "learned that Ms. Messier spoke to Mr. Fonesca and told him that she didn't think I was qualified," but Fonesca stated in his declaration that he and Messier never spoke about Abad. Vague information in Abad's declaration about a conversation she did not witness, and her assumptions about the effects of that conversation, are not sufficient to create a triable issue of fact on the issue of constructive discharge. In addition, "[a]s a matter of law," allegations that an employee "received an unfair performance evaluation and was not considered for promotion to a management position" "do not create intolerable working conditions transforming a voluntary resignation into constructive discharge." (*Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal.App.4th 101, 115.)

Abad also asserts that her constructive discharge claim is supported by the fact that "when Abad reported the discrimination she suffered because of her pregnancy to human resources, Abad was ignored." She cites her July 1, 2015 email to

Hirano, in which Abad said she felt like she was at an “intentional disadvantage” because she was on leave when the open Creative Content director position was posted online “without even letting me know that it was available.” Disney points out that Abad never complained about any alleged harassment based on her pregnancy, the email does not directly state that Abad felt she had been treated unfairly based on her pregnancy, and the “fact that Abad was upset by the mere posting of the job cannot reasonably be construed as a complaint of discrimination or harassment.” Abad admits in her reply brief that her “complaint” to human resources was “indirect,” but asserts that it “does suggest that there is something going on behind [Abad’s] back and heavily implies that she is concerned about these kinds of actions.” The fact that human resources did not respond to a single, vague email that did not directly mention discrimination or harassment is not evidence of constructive discharge. (See, e.g., *Turner, supra*, 7 Cal.4th at p. 1247 [“In order to amount to a constructive discharge, adverse working conditions must be unusually ‘aggravated’ or amount to a ‘continuous pattern’ before the situation will be deemed intolerable.”].)

In short, the evidence does not support a triable issue of fact as to constructive discharge. There is no evidence that Abad’s working conditions changed from what they had been before she announced her pregnancy. At the time Abad began her parental leave, she stated that she wanted to return. The only difference at the time of Abad’s resignation was that Abad was disappointed she did not receive a promotion she felt she deserved. “It is the working conditions themselves—not the plaintiff’s subjective reaction to them—that are the sine qua non

of a constructive discharge.” (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1274.) Abad did not present evidence to show a triable issue of fact regarding constructive discharge. The trial court’s ruling on this basis was not erroneous.

2. *Abad’s qualifications for a director position*

Abad also contends that she was qualified for the role of director, because she “had excelled in assuming the duties and responsibilities of a director, particularly those meant to be performed by Mansur.” Disney disagrees, stating that there is “substantial evidence that Abad was not qualified for the director job.”

In support of her position, Abad cites her own declaration, deposition testimony in which Abad discusses Mansur’s work, an email in which Messier noted that Abad and Mansur were working together on certain projects, deposition testimony by Abad’s colleague Evelyn Livermore, in which Livermore states that Abad was “looking for opportunities to grow,” and deposition testimony in which Hirano stated that Abad was focused on getting a promotion.

Viewing this evidence in the light most favorable to Abad, it does not support her claim that she was qualified for a director role on the Creative Content team. It is undisputed that Abad was successful as a manager, but success in one position does not necessarily warrant a promotion to a different position. It is also undisputed that Messier told Abad in the fall of 2014 that she was not qualified to be a director. Abad also acknowledged that shortly before her parental leave, Messier indicated to Abad in the “next steps” document that Abad needed to do more before being considered for a promotion. Abad seemed to acknowledge

that she was not perceived as ready for a director role in her August 21, 2015 email, in which she asked Messier if she would “allow[] me to develop in the role under you?”

To support her assertion that she was ready to be promoted to director, Abad relies primarily on her assertions that she was doing some of Mansur’s work. However, it is undisputed that Mansur’s work was not of a quality that satisfied Messier. Thus, Abad’s assertion that she was in fact responsible for this work does not warrant a conclusion that she was qualified to fill the director role Mansur vacated.

Moreover, Disney points out that there is additional evidence that Abad was not ready to be promoted. Redmond stated in his declaration that he felt Abad was not ready for a director role, because “although Ms. Abad was very good at managing the information needed to produce the content segments and keeping the workflow moving, I did not observe in her the ability to see or execute the big picture of the full plan for all creative content pieces for a given movie.” Hilary Hartling, who headed the Synergy team, testified that she did not view Abad as ready for a director role on her team because there were more senior employees on her team who would be eligible for promotions first.

In short, Abad’s own opinion that she was qualified for a director position, and other employees’ awareness that Abad wanted a promotion, is insufficient to establish that Abad was qualified for the promotion she wanted.

3. *Discriminatory motive*

Abad asserts that “Messier’s biased comments to Abad regarding her pregnancy establish that Messier held a discriminatory animus toward Abad.” Abad points to Messier’s

comments that Messier was too focused on her career to have children, and most high-level executives at the company either do not have children or rarely see their children. Abad also cites Messier's comment in response to Abad's announcement of her pregnancy, which was either "Good luck with that," or "Man, you're in for it."

Abad does not cite any evidence connecting Messier's remarks with any employment decision relating to Abad. "[S]ection 12940(a) does not purport to outlaw discriminatory thoughts, beliefs, or stray remarks that are unconnected to employment decisionmaking." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 231.) Messier's focus on her career to the exclusion of children, or her observation that other executive women did not have children do not suggest that Abad could not advance at Disney due to her pregnancy. "[T]he plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision." [Citations.] Requiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision." (*Id.* at p. 232.)

This case is unlike *Western Dental, supra*, 23 Cal.App.5th 726, in which the court found there was significant evidence of discriminatory animus. There, the plaintiff worked as a student extern at a Western Dental office in Napa, a position that often resulted in a permanent job offer. (*Id.* at p. 732.) She was pregnant at the time, but did not tell anyone at the dental office. (*Ibid.*) The plaintiff received high marks on her performance

evaluations. (*Id.* at p. 733.) At some point during her externship, another employee saw prenatal vitamins in the plaintiff's purse and concluded that the plaintiff was pregnant. (*Ibid.*) The plaintiff overheard the externs' supervisor remark that if the plaintiff was pregnant, "I don't want to hire her." (*Ibid.*) Shortly thereafter, the plaintiff was told that there were no open positions for dental assistants in the Napa office, but she could apply in a different office. (*Id.* at p. 734.) However, a dental assistant position in the Napa office was advertised before the plaintiff's externship ended. (*Id.* at p. 734-735.)

The Court of Appeal held that the plaintiff's evidence was adequate to defeat summary judgment, because there was sufficient evidence of discriminatory animus. The supervisor made remarks about not wanting to hire the plaintiff while she was pregnant and told the plaintiff there were no jobs available, which was false. The supervisor also told the plaintiff to contact the office about a job after she had her baby, "permitting the inference that [the plaintiff] would not be considered for a position while she was pregnant." (*Western Dental, supra*, 23 Cal.App.5th at p. 743.) The court stated, "As a whole, this evidence satisfied [the plaintiff's] burden of demonstrating triable issues as to whether Western Dental intentionally discriminated against her by discouraging her from applying to become a dental assistant." (*Ibid.*)

Here, by contrast, Abad has presented no evidence connecting her pregnancy with any adverse employment action. Instead, Abad's arguments regarding discriminatory motive consist mostly of ascribing sinister motivations to ordinary employment actions. Abad contends, for example, that an email from Messier to Hirano, which asked about "next steps with"

Abad, demonstrated that “Messier continued to collude with Hirano to impede Abad’s growth within the company.” In discussing the fact that Messier hired a different director candidate, Abad states, “Messier finally denies the director role to Abad.” Email communications between Messier and Hirano regarding the call to Abad in September 2015 are characterized as “their plan to deny Abad the director role and getting their story straight.” Abad argues that when she expressed interest in joining Fonesca’s team, “Messier saw another opportunity to sabotage Abad’s chances of being promoted.” She also states that Messier and Hirano had a “deliberate plot to keep [Abad] out of the running for three separate director positions.” The evidence simply does not support the discriminatory motives that Abad speculates were behind these ordinary actions.

In addition, Abad asserts that discriminatory motives were present based on her own subjective reactions to the events that occurred. Abad states, for example, that she found the timing of Mansur’s departure suspicious, assuming without evidentiary support that it was timed to coincide with her parental leave and therefore undermine her chances of stepping into the director position. But Mansur stated in his declaration that Abad’s parental leave had nothing to do with his decision determining his departure date from Disney. Abad also stated that she “found it odd that Ms. Messier knew that I had been handling a large portion of [Mansur’s] job duties and knew I was very interested in his position, yet made no effort to reach out to me to tell me the job was being posted.” Given that Messier did not think Abad was qualified for the director role at that time, it is not “odd” that she would not specifically encourage Abad to apply for that position. Moreover, the timing of Mansur’s departure and the

director opening did not prevent Abad from applying for the role, so there were no negative effects associated with this timing.

A plaintiff's "subjective beliefs in an employment discrimination case do not create a genuine issue of fact." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.) Instead, a "plaintiff's evidence must relate to the motivation of the decision makers to prove, by nonspeculative evidence, an actual causal link between prohibited motivation and termination." (*Id.* at pp. 433-434.) No such evidence was presented here. There are no statements, such as those in *Western Dental*, that Messier did not want a pregnant woman or parent in the director position, or that Abad should not be considered for the role because she was on parental leave.

Disney asserts that any suggestion of discriminatory motive is undermined by evidence that the director role was filled by a woman without regard to whether she was a parent, Messier hired other women without regard to their parenthood status, and Messier promoted Redmond, who took parental leave for the birth of his third child while Abad was also on parental leave. Abad asserts in her reply brief on appeal that she was discriminated against because she was *pregnant*, and therefore employment decisions regarding non-pregnant employees are irrelevant.

Abad does not offer any explanation as to why the pregnancy itself—as opposed to taking parental leave or being a working parent—was the basis for the discrimination. Indeed, this position contradicts Abad's central allegations that she was discriminated against based on her gender and her use of family leave time. It also contradicts Abad's assertions in her opening brief that "Messier did not believe a woman could have a

successful career . . . while raising a child.” Messier’s allegedly discriminatory comments related solely to parenthood, children, and careers—not pregnancy. In addition, Abad asserts that the timing of Mansur’s departure was based on Abad’s parental leave, not the fact that she was pregnant. In light of Redmond’s planned parental leave, it appears that such leave was not limited to pregnant women. Moreover, Abad has presented no evidence connecting her pregnancy with any employment decision. In short, Abad did not present evidence sufficient to establish a triable issue of fact as to discriminatory motive.

B. Retaliation

Abad also asserts that she established a prima facie case of “retaliation for complaining of pregnancy discrimination.” “[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) “An ‘adverse employment action,’ which is a critical component of a retaliation claim . . . , requires a ‘substantial adverse change in the terms and conditions of the plaintiff’s employment.’” (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063.)

Abad cites her July 1 email to Hirano as “protected activity” involving a complaint “of the discrimination Abad suffered on the basis of her pregnancy.” As noted above, in the email, Abad told Hirano that she had applied for the director position online, but said that “the timing and the sense of what occurs makes me feel at an intentional disadvantage. Given my

pregnancy and leaves that have occurred as a result. Also . . . the way the team handled the news of [Mansur's] departure and then subsequent posting of the position on job boards for all to apply without even letting me know that it was available left me feeling very out of the loop. A major change that effected [sic] my career was made while I was away and no one communicated it to me, and to be honest I feel that this was not just by happenstance. This makes me very distraught and anxious as my career means everything to me and my young family.” Abad admits that the email was “indirect.”

An employee’s complaint about discrimination does not need to include explicit legal language. (See *Yanowitz, supra*, 36 Cal.4th at p. 1047 [“an employee is not required to use legal terms or buzzwords when opposing discrimination.”].) However, to serve as a basis for a retaliation claim, the employee’s communication must be sufficiently clear to put the employer on notice. “Standing alone, an employee’s unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation.” (*Id.* at p. 1046.) In addition, “complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.” (*Id.* at p. 1047.)

Even assuming this email could be interpreted as a complaint relating to pregnancy discrimination, Abad cites no evidence connecting the email with any adverse employment action. Abad stated that Hirano never responded to the email or acted upon the information within it. There also is no evidence suggesting that the email itself or the gist of the message was

communicated to Messier, or that such information affected Messier's decision in hiring a director. Thus, Abad has not presented evidence showing a triable issue of fact as to a prima facie case for retaliation.

As noted above, an employer may show that it is entitled to summary judgment by "showing either that one or more elements of the prima facie case 'is lacking, *or* that the adverse employment action was based on legitimate nondiscriminatory factors.'" (*Husman v. Toyota Motor Credit Corp.*, *supra*, 12 Cal.App.5th at p. 1181 [emphasis added].) Here, Disney met its burden to demonstrate that Abad could not establish a prima facie case, and the evidence presented by Abad was insufficient to show a triable issue of fact. Thus, summary judgment was properly granted.

Abad also argues that the evidence showed Disney's purported nondiscriminatory reasons for failing to promote Abad were pretext. As discussed above, evidence of pretext is relevant to the third stage of the *McDonnell Douglas* burden shifting analysis. As the evidence does not support a prima facie case, we do not reach this stage of the analysis, and therefore do not consider Abad's arguments as to pretext.

C. Attorney fees

Disney asserts that Abad's "unreasonable arguments on appeal support[] an attorneys' fees award under the FEHA." A prevailing defendant in a FEHA case "should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." (*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 115.) Here, Abad's evidence was not strong, but it was not so objectively without

foundation as to warrant an award of attorney fees. We therefore deny Disney's request for attorney fees on appeal under FEHA.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.